

**ST 03-8**

**Tax Type: Sales Tax**

**Issue: Reasonable Cause on Application of Penalties**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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ABC, INC.,	)	Docket No.	02-ST-0000
	)	IBT No.	0000-0000
	)		
v.	)		
THE DEPARTMENT OF REVENUE	)	John E. White,	
OF THE STATE OF ILLINOIS	)	Administrative Law Judge	

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**RECOMMENDED ORDER  
REGARDING THE DEPARTMENT'S MOTION TO DISMISS**

**Appearances:** John Doe, appeared *pro se*; Mark Muchin, Special Assistant Attorney General, appeared on behalf of the Illinois Department of Revenue.

**Synopsis:** This matter involves a protest of a letter mailed to ABC, Inc. ("taxpayer") after the Illinois Department of Revenue's ("Department"), Board of Appeals directed the Department's Account Management Division to act on taxpayer's request for abatement of penalties. The instant matter involves the Department's Motion to Dismiss ("Department's Motion"). After considering the Department's Motion, and the arguments presented prior to and at hearing, I am including in this recommended order statements of uncontested fact and conclusions of law. I recommend that the Director grant the Department's Motion, and that taxpayer's protest be dismissed.

**Facts Not In Dispute:**

1. Twenty-six separate tax assessments were self reported by taxpayer regarding the periods of 1/92 through 7/96. Department's Amended Motion to Dismiss

- (“Department’s Motion”), ¶ 1 & Ex. 1 (copy of LTR-201 Request for Abatement, dated March 22, 2002, identifying assessments as “B” assessments).<sup>1</sup>
2. After those twenty-six assessments became final, the Department issued a Notice of Penalty Liability (“NPL”) to John Doe as a responsible officer of taxpayer. Department’s Motion, ¶ 2 & Ex. 2 (copy of U.S. Postal Receipt showing delivery of NPL to Doe’s address on 9/2/97).
  3. Doe did not protest the NPL, and it became final 60 days after it was issued. Department’s Motion, ¶ 2; 35 ILCS 735/3-7(b); 35 ILCS 120/4.
  4. On or about July 1998, after the NPL became final, the Department served a notice of tax lien to Doe, and subsequently imposed a lien upon Doe’s real property. Department’s Motion, ¶ 3.
  5. Prior to March 2002, taxpayer filed a petition with the Department’s Board of Appeals. *See* Department’s Motion, ¶ 4 & Ex. 1.
  6. On March 22, 2002, the Department issued a letter titled, “LTR-201 Request for Abatement” to taxpayer. Department’s Motion, Ex. 1.
  7. That 3/22/02 letter provided, in part:

Dear Taxpayer:

The Board of Appeals has authorized the Account Management Division to take action on your abatement request.

Based on our review, we have determined that the circumstances described in your request are not considered to be extenuating. Therefore, we have denied your request for abatement of

- late filing penalty
- late payment penalty

Below is a breakdown of your remaining liability

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<sup>1</sup> A “B” assessment is one based on a signed return filed with the Department, but without a full remittance of tax.

If you do not agree with our decision, you may file a protest and request an administrative hearing regarding this matter. \*\*\*

Sincerely,

Cheryl A. Bradley  
Revenue Tax Specialist  
Account Management Division

Department's Amended Motion, Ex. 1.

8. Taxpayer protested that letter, and asked for a hearing. Taxpayer's Protest, dated 4/9/02.

**Conclusions of Law:**

The Department's Motion is predicated upon § 2-619(a)(1) of Illinois' Code of Civil Procedure. 735 ILCS 5/2-619(a)(1). Section 2-619 provides, in pertinent part:

Involuntary dismissal based upon certain defects or defenses.

(a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

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(1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.

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(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

735 ILCS 5/2-619 (1996).

Generally, section 2-619 affords a means of obtaining a summary disposition of issues of law or of easily proved issues of fact. Johnson v. Du Page Airport Authority,

268 Ill. App. 3d 409, 414, 644 N.E.2d 802, 806 (2d Dist. 1994). Under section 2-619(a)(1), a cause of action can be dismissed when a court finds it lacks subject matter jurisdiction. Young v. Caterpillar, Inc., 258 Ill. App. 3d 792, 793, 629 N.E.2d 830, 831 (3<sup>rd</sup> Dist. 1994). A section 2-619(a)(9) motion is properly allowed only when it raises an affirmative matter which negates plaintiff's cause of action completely or when it refutes crucial conclusions of law or conclusions of material fact that are unsupported by allegations of specific facts. American Health Care Providers, Inc. v. County of Cook, 265 Ill.App.3d 919, 922, 638 N.E.2d 772, 775 (1<sup>st</sup> Dist. 1994).

In assessing a section 2-619 motion to dismiss, all facts properly pleaded or which are clear from the face of the pleadings, and which relate to the claim, must be taken as true. Barber Coleman Co. v. A & K Midwest Insulation Co., 236 Ill. App. 3d 1065, 1072-74, 603 N.E.2d 1215, 1221-23 (5<sup>th</sup> Dist. 1992). Here, the facts of what occurred are clear, and are not in dispute. The Department issued a Notice of Penalty Liability ("NPL") to Doe as a responsible officer of taxpayer. Doe did not protest that NPL. Instead, Doe asked for relief from the Board of Appeals, which referred his request to another Department division. The point of the Department's motion is that, despite the letter writer's erroneous statement to taxpayer that it could protest the Department's action, Illinois law precludes any appeal of action taken by the Board of Appeals. The Department is correct.

Section 2505-505 of Illinois' Department of Revenue Law (20 ILCS 2505/2505-1 *et seq.*) provides:

Board of appeals. The Department has the power to appoint a board of appeals, which shall consist of 3 persons, to review departmental actions in controversies involving the determination of tax liability arising under the

tax laws administered by the Department. **The board shall have no jurisdiction prior to the time a notice of deficiency or a notice of assessment has become final unless (i) the board has made a special finding concurred in by all members that action by the board is the most efficient and expeditious manner of resolving the controversy or (ii) the Director so orders.** Cases shall be reviewed by the board in accordance with the procedure established by departmental rules and regulations adopted pursuant to the provisions of Section 2505-795. **Decisions made pursuant to this Section are not subject to the provisions of Article III of the Code of Civil Procedure.**

The exercise of the power of appointment for members of the board of appeals is mandatory, and the Director shall make his appointments within 120 days after the effective date of this amendatory Act of 1979. Each member of the board of appeals shall serve for a period of one year and shall continue to serve thereafter at the pleasure of the Director. Compensation for members shall be determined by the Director.

Decisions of the Board shall not take effect unless and until approved by the Director.

The express denial of applicability of Article III of the Code of Civil Procedure shall be construed as declaratory of existing law, as expressed in Section 3-102 of the Code of Civil Procedure, and not as a new enactment.

20 ILCS 2505/2505-505 (emphasis added). Here, there is no dispute that the assessments issued to taxpayer and the NPL issued to John Doe were final, and the statute authorizing Board action expressly precludes appeal therefrom. *Id.*

Additionally, taxpayer's protest is not based on its attempt to rebut the Board's determination that facts do not warrant a reduction in the amount of penalties taxpayer owes based on its late filings or payments. Taxpayer's Protest, dated 4/9/02. Rather, the protest reflects Doe's attempt to collaterally attack the Department's imposition of a lien on his personal residence. *Id.* Since, however, Doe's personal responsibility for the corporation's unpaid tax liability was finalized as a matter of law when Doe failed timely

to protest the NPL, the Department's Office of Administrative Hearings lacks the authority to grant him any relief regarding the Department's lawful attempt to collect the underlying tax. 35 ILCS 735/3-7(b); 35 ILCS 120/4.

**WHEREFORE, IT IS HEREBY ORDERED THAT:**

- The Department's Motion to Dismiss is granted.
- Taxpayer protest is dismissed because the Board of Appeals' action was not subject to protest.

Date: 5/27/2003

John E. White  
Administrative Law Judge